

High Expectations

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On November 18, the [CJEU](#) ruled in a much-anticipated case concerning referrals from the Polish Supreme Court regarding the Disciplinary Chamber of Polish Supreme Court and, indirectly, the National Council of Judiciary. To say that expectations for this judgment among Polish civil society and academia were high would be a gross understatement. The Polish judges-activists standing against the backsliding of the rule of law in Poland looked to this ruling as to the promised day when the Luxembourg court will finally eviscerate one of the cores of recent changes to Polish judiciary – the “new” National Council of Judiciary, appointed mostly by the Parliament and widely seen as a supportive of the government. During yesterday’s briefing organised by Democracy Reporting International in Brussels, we’ve advised caution, warning that this might not go the way the optimists think. In fact, one of us observed, that both sides might declare victory.

Turns out, we were right. Immediately after the CJEU began proclaiming the judgment, Polish media flared up with declarations of victory. NGOs and experts claimed that the judgment is a massive victory for the rule of law and democracy. “The Court found the Disciplinary Chamber of the Supreme Court as contrary to EU law” was a frequent quote, along with an expectation that the ruling party “must dismantle the non-independent National Council of Judiciary”. Representatives of the government weren’t far behind. “No law concerning the Chamber or the Council was found as violating EU standards” tweeted Paweł Jabłoński, advisor to the Prime Minister of Poland. A recurring talking point for the governmental side was that the Polish Constitutional Tribunal is the right place to address the issue. The President of Poland concluded that this judgment means that the CJEU has no intention of barging into the internal matters of Polish judiciary.

Is the truth somewhere in the middle, then? Surprisingly, it appears so. First, some broader context. This judgment comes from three referral cases combined into one. Referrals are, by their very nature, limited in what the courts can ask about, what the CJEU can say and what are the practical implications of the ruling. However, there is a case on identical matter – the question of independence of “new” chambers of Polish Supreme Court and the National Council of Judiciary – lodged with the CJEU by the Commission acting within the infringement procedure. Infringement procedures are far more wide-ranging in terms of their scope and possible consequences.

Second, what the Court says and what it doesn’t say. Contrary to expectations expressed by many vested in the fate of Polish courts, the CJEU didn’t outright state that the Disciplinary Chamber or the National Council of Judiciary are not independent. The much expected full-out damning of the altered elements of Polish judiciary seen as acting as proxies of the ruling party is nowhere to be found. But at the same time, it’s not that the CJEU does conclude that these entities are in fact fully compliant with EU law. The Court basically says, that a domestic court which

comes into suspicion of another court (or, as it is the case here, of another chamber of the very same court) being not independent, it should evaluate the matter itself and act according to the principle of primacy of EU law, disapply national laws which would instruct it to hand over a case to a not-independent court.

The Court of Justice provided criteria which allow the Polish Supreme Court to review the status of the “new” National Council of Judiciary (points 142-145) and the Disciplinary Chamber of Supreme Court (points 147-152). The referring court should take into account, *inter alia*, the procedure under which the NCJ was appointed as well as the way it exercises its constitutional responsibilities. Furthermore, those elements should be “taken together” and assessed broadly. In our opinion it is highly unlikely that, in the light of those criteria, the Disciplinary Chamber will pass the “test of the independence” adopted by the CJEU in today’s ruling. Unfortunately, the battle over the rule of law in Poland taught us that it is even less likely that the government will follow such findings. That will be the moment when the captured Constitutional Tribunal might be asked by the government to step in (as suggested today by *inter alia* Minister of Justice/Prosecutor General). In October 2018, after the first preliminary references dealing with judiciary reform in Poland, the Minister of Justice submitted a motion to the Tribunal arguing that Article 267 TFEU (which lays out the referral procedure) is incompatible with the Polish Constitution. Will the situation happen again?

Suggestions that the Constitutional Tribunal should “verify” the CJEU ruling only confirm the current role of the Tribunal – that of legitimizing decisions undertaken by parliamentary majority. In March 2019, the Tribunal ruled that the status of NCJ was compatible with the Constitution. It did not, however, prevent the Court of Justice from issuing today a ruling in a case regarding the status of new Disciplinary Chamber appointed by the President on a recommendation by NCJ.

Most probably a more general assessment of the NCJ and Disciplinary Chamber will be provided by the CJEU in the aforementioned infringement action against Poland submitted by the Commission in October 2019. The Commission’s complaint deals not only with the institutional solutions but also with fairness of the disciplinary procedures initiated against judges as well with possible violation of Article 267 TEU by disciplinary steps undertaken against judges who referred cases to the CJEU.

